ALIAS ISMAIL

v.

HAIRUDDIN MOHAMAD & ANOR

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: J-01-273-96]
18 SEPTEMBER 1997

LIMITATION: *Public Authorities Protection Act 1948, s. 2 - Whether Court has discretion to set aside defence of limitation - Action against Government - Malicious prosecution - Failure to proceed within three years - Whether action must necessarily fail - Government Proceedings Act 1956, s. 38*

On 27 October 1987, the appellant, a teacher in the government service, was charged in the Magistrate's Court, Segamat, with the theft of some durians. On 24 January 1988, the charge against the appellant was withdrawn, purportedly on the instruction of the Deputy Public Prosecutor ('the DPP'). The appellant discovered subsequently that the police had preferred the charge in question without the DPP's knowledge, and in the circumstances, sought to sue the Officer in Charge of the Police District, Segamat and the Government of Malaysia *inter alia* for malicious prosecution. The appellant, however, only filed the suit in 1996 ie, some nine years later, or about five years after the Ministry of Education had given him consent to proceed with the suit. The suit in the event was struck out by the learned Senior Assistant Registrar for being out of time against which the appellant has now appealed.

Held:
Per Abdul Malek Ahmad JCA

[1] The appellant has taken more than three years to file the action. Even if this court were to take the date he received the letter of approval to file the action, which should not be the case, the relevant date was 12 November 1991 and he would still be out of time. The court has no discretion to set aside a defence of limitation, and on the limitation point alone, therefore, there is no merit in this appeal.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PENGHADAN: *Samada mahkamah mempunyai budibicara untuk mengenepikan pembelaan had masa - Tindakan terhadap Kerajaan - Pendakwaan niat-jahat - Tindakan tidak dimulakan dalam masa tiga tahun - Samada semestinya gagal - Akta Perlindung Pihak Berkuasa Awam 1984, s. 2 - Akta Prosiding Kerajaan 1956, s. 38*

Pada 27 Oktober 1987, perayu, seorang guru yang berkhidmat dalam Perkhidmatan Kerajaan, telah dituduh di dalam Mahkamah Majisteret, Segamat, dengan tuduhan mencuri beberapa biji durian. Pada 24 Januari 1988, tuduhan terhadap perayu telah ditarik balik, kelihatannya atas arahan Timbalan Pendakwa Raya ('TPR'). Perayu mendapat tahu kemudiannya bahawa pihak polis telah mendakwanya tanpa pengetahuan TPR, dan dalam halkeadaan tersebut, bertindak untuk mendakwa Ketua Polis Daerah, Segamat dan Kerajaan Malaysia, antaranya kerana pendakwaan niat-jahat. Perayu, bagaimanapun, hanya memfailkan tindakannya itu pada tahun 1996 iaitu lebih kurang sembilan tahun selepas itu, atau lebih kurang lima tahun setelah Kementerian Pendidikan memberinya restu untuk menngambil tindakan undang-undang tersebut. Tindakan perayu, oleh yang demikian, telah ditolak oleh Penolong Kanan Pendaftar kerana terlebih had masa dan terhadap keputusan in perayu telah merayu.

Diputuskan:
Oleh Abdul Malek Ahmad HMR

[1] Perayu mengambil masa lebih daripada tiga tahun untuk memfailkan tindakannya. Walaupun Mahkamah ini mengambilkira tarikh beliau menerima persetujuan dari Kementerian Pendidikan untuk bertindak, yang tidak sepatutnya berlaku, tarikh yang relevan ialah 12 November 1991 dan beliau masih lagi berada diluar had masa. Mahkamah tiada budibicara untuk mengenepikan pembelaan had masa, dan oleh hal yang demikian, atas alasan penghadan semata-mata, rayuan ini jelas tidak bermerit.

[Rayuan ditolak.]

Cases referred to:
Riches v. Director of Public Prosecutions [1973] 1 WLR 1019 ***(foll)***
Tio Chee Hing & Ors v. Government of Sabah [1981] 1 MLJ 207 ***(foll)***

Legislation referred to:
Government Proceedings Act 1956, s. 38
Public Authorities Protection Act 1948, s. 2
Rules of the High Court 1980, O. 18 r. 19

Appellant appearing on has own behalf
For the respondent - Teo Say Eng, SFC

JUDGMENT

Abdul Malek Ahmad JCA:

On 22 August 1996, the learned Senior Assistant Registrar had granted an order in terms of the defendants' (hereinafter 'the respondents') application by summons in chambers to strike out the plaintiff's (hereinafter 'the appellant') statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 (hereinafter 'the Rules') as it did not disclose a reasonable cause of action.

In essence, the appellant's statement of claim against the defendants, who is the former officer in charge of the police district of Segamat, Johor and the Inspector General of Police respectively, stemmed from an incident where the appellant was charged in the Magistrate's court in Segamat on 27 October 1987 for theft of four durians belonging to his aunt. He had claimed trial to the charge.

On the first hearing date, the prosecution was not quite ready as the relevant papers were with the Deputy Public Prosecutor. On the next hearing date namely 24 January 1988, the prosecution withdrew the charge against the appellant purportedly on the instructions of the Deputy Public Prosecutor. However, the appellant became aware of a letter, as a copy was sent to him, from the Deputy Public Prosecutor's office dated 13 June 1988 to the officer in charge of criminal investigations asking for the investigation papers in this case. This indicated that the Deputy Public Prosecutor was not even aware of this matter before the withdrawal of the charge against the appellant. The appellant concluded that the theft charge against him was brought about by the police in bad faith which had resulted in him undergoing stress and shock for which he had claimed damages against the defendants amounting to RM1,550,220.

It may be appropriate at this juncture to list out the details of how that amount is reached. Paragraph 5 of the appellant's statement of claim gives the following particulars:

(a) lowering the dignity of the appellant, a husband and father to seven children	RM 75,000
(b) lowering the dignity of the appellant's wife, a wife and mother to seven children	RM 75,000

(c)	lowering the dignity of the appellant's seven children	RM100,000
(d)	tainting the teaching profession to which the appellant belonged	RM500,000
(e)	general damages for shame and embarrassment throughout the appellant's life and for future generations	RM500,000
(f)	special damages because since the defamation case arose, the lives of the appellant and his family are forever in distress being spurned by society not familiar with the law and by people who had been calling the appellant names like "the appellant is mad" and "the appellant is a thief"	RM300,000
(g)	Court fees	RM 200
	Total	RM1,550,200

The appellant had also pleaded that the police prosecuting officer had committed perjury by stating that the Deputy Public Prosecutor had instructed him to withdraw the charge on 24 January 1988 when the Deputy Public Prosecutor had written a letter asking for the investigation papers only subsequently that is on 13 June 1988. Being a teacher in government service, the appellant said that he could not sue the Government then but the Ministry of Education had given their letter of consent on 24 August 1990.

In addition, the appellant had in his statement of claim asked for a public apology to him and his family and for an injunction to prevent the defendants from using the name of Bukit Aman, the police headquarters, as an excuse for their actions. Because the case of his allegation of assault against the police was not heard as a consequence of the withdrawal of the theft charge against him, he had also asked the court for a licence to possess a firearm immediately for fear of his safety.

But the merits of the matter were of no consequence to us since the only issue that stood out was the question of limitation. The pleadings suggested two causes of action, for malicious prosecution and for defamation.

The defendants did not file any defence but instead had filed the application mentioned earlier under O. 18 r. 19 of the Rules which had been allowed by the learned Senior Assistant Registrar purely on the limitation point. Before the judge in chambers on appeal, the appellant had asked to be exempted from the limitation provision the reason being that in 1988 he was still serving as

a teacher and under the General Orders he could not take any action against the Government without the approval of the head of department. He only received the relevant letter from the Legal Adviser of the Ministry of Education dated 24 August 1990 on 12 November 1991.

Before the courts below, the learned Federal Counsel had reiterated that the appellant was governed by the limitation provision and was out of time. He had referred to s. 2 of the Public Authorities Protection Act 1948 which states that where any suit, action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority, that suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of. Further, s. 38 of the Government Proceedings Act 1956 provides that the Government, in any civil proceedings against it, may as a defence rely on any written law relating to the limitation of time in any proceedings against public authorities.

In the instant appeal, it is not disputed that the appellant had taken more than three years to file the action. The incident took place in 1987 but the suit was filed only in 1996, some nine years later. Even if we were to take the date he received the letter of approval to file the action, which should not be the case, the relevant date was 12 November 1991 and he would still be out of time.

The court has no discretion to set aside a defence of limitation. In *Riches v. Director of Public Prosecutions* [1973] 1 WLR 1019, it was held that it was open to the defendant on an application to dismiss an action as being frivolous and vexatious or an abuse of the process of the court to show that the plaintiff's cause of action was statute barred and must inevitably fail for that reason.

This had been followed by the Federal Court in *Tio Chee Hing & Ors. v. Government of Sabah* [1981] 1 MLJ 207 and *Haji Hussin bin Haji Ali & Ors. v. Datuk Haji Mohamed bin Yaacob & Ors.*; and connected cases [1983] 2 MLJ 227.

In *Tio's* case the relevant extract of the Federal Court's judgment states:

> The arguments for and against the summons have not been incorporated in the record but the learned judge agreed with the Government. He delivered an admirable judgment which we do not pretend we can better and which we therefore reproduce:

The breach alleged by the plaintiffs, if there was such a contract, had occurred more than six years ago. The plaintiffs in their affidavit in opposition made by Tio Chee Hing say to the effect that the Limitation Ordinance does not apply to their case because they were only aware that they could sue the present State Government in 1977 and because the agent of the defendants had as late as 25 November 1978, demanded payment of quit rents. These, in my opinion, are not facts which would make the Limitation Ordinance inapplicable to the plaintiff's action.

It was a settled rule of practice in England that a party relying upon the statute of limitations must plead it as a defence specifically. The defence was not available, and it was no part of the duty of the court to take notice of the statute of limitations, unless it was specifically pleaded. On the authorities such as *Murray v. Secretary of State for India*; [1931] WN 91 and *Dismore v. Milton* [1938] 3 All ER 762 it was not possible for the defendant to apply under O. 25 r. 4 of the Rules of the Supreme Court to have the claim struck out where it appeared from the statement of claim that the plaintiffs' cause of action arose at a time before the period prescribed by the statute of limitations.

The practice was that the defendant had to deliver a defence pleading the statute of limitations as a defence specifically. It was then for the plaintiffs to show that the statute was inapplicable. This would be followed by a summons for directions for an issue to be tried.

We have, I think, followed this practice in this country.

Recently, the Court of Appeal in *Riches v. Director of Public Prosecutions* [1973] 2 All ER 935 considered that the observation in *Dismore v. Milton* went too far. It held, not following Dismore's case, that where it was clear that the defendant was going to rely on the statute of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it, the claim would be struck out. His Lordship, Davies LJ in his judgment at p. 939 said:

> In the light of those more recent authorities I think, as I say, that perhaps the observations of this court in *Dismore v. Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which had already been barred by the statute of limitations and must fail.

With respect we entirely agree.

In *Haji Hussin's* case, it was held by the Federal Court that where it was clear that the defendants were going to rely on limitation and there was nothing before the court to suggest that the plaintiff could escape from it, the claim would be struck out. It also ruled that the circumstances in that case would not justify the court exercising its discretion in favour of the appellants where there had been unreasonable vacillation and delay.

On the limitation point alone, therefore, we saw no merit in this appeal. We did not even find it necessary to call the Senior Federal Counsel to reply. Accordingly, we had to dismiss the appeal but considering the circumstances of this case, and with no objections from the learned Senior Federal Counsel, we directed that there should be no order as to costs and that the deposit is to be refunded to the appellant.

Reported by WA Sharif